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DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 38

RIN 2900-AO99

Reimbursement for Caskets and Urns for Burial of Unclaimed Remains in a National Cemetery

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs National Cemetery Administration (NCA) proposes to amend its regulations to establish a new program to furnish caskets and urns for the interment of the remains of veterans with no known next-of-kin (NOK) where sufficient financial resources are not available for this purpose. This rulemaking is necessary to implement new statutory authority by establishing procedures to provide reimbursement for privately purchased caskets or urns and to otherwise administer the new program. This proposed rule would implement a portion of the Dignified Burial and Other Veterans' Benefits Improvement Act of 2012 (the Act).

DATES: Comments must be received on or before [insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through

<http://www.Regulations.gov>; by mail or hand-delivery to: Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW,

Room 1068, Washington, DC 20420; or by fax to (202) 273-9026 (this is not a toll free number). Comments should indicate that they are submitted in response to "RIN 2900-AO99 – Reimbursements for Caskets and Urns for Burial of Unclaimed Remains in a National Cemetery." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Cynthia Riddle, Office of Field Programs (41A), National Cemetery Administration (NCA), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Telephone: (202) 461-6306 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On January 10, 2013, Congress enacted the "Dignified Burial and Other Veterans' Benefits Improvement Act of 2012" (the Act), Public Law 112-260, 126 Stat. 2417 (2013), section 101 of which amended 38 U.S.C. 2306 to authorize the Department of Veterans Affairs (VA) National Cemetery Administration (NCA) to furnish a casket or urn for interment in a VA national cemetery of the unclaimed remains of veterans for whom VA cannot identify a next of kin (NOK) and determines that sufficient financial resources for the furnishing of a casket or urn for burial are not available. VA proposes to add a new § 38.628 to part 38 of title 38 of the

Code of Federal Regulations (CFR) to implement this new statutory authority by providing a monetary reimbursement for privately purchased caskets or urns that meet NCA standards and are used to inter the remains of such veterans in VA national cemeteries. On June 26, 2014, VA published a proposed rule which contained several errors. We are therefore publishing this corrected version of the proposed rule.

NCA is responsible for administering cemetery programs and memorial benefits, which include the provision of medallions, headstones, and markers, as well as burial in a VA national cemetery for eligible veterans and their family members. Section 2402 of title 38, United States Code, establishes eligibility requirements for burial in a VA national cemetery. For eligible veterans and certain family members, VA covers the cost of interment in a VA national cemetery and provides a headstone or marker (including inscription), as well as a gravesite or cremation niche and perpetual care of the gravesite or cremation niche. The Act authorizes VA to furnish a casket or urn for the burial in a national cemetery of the remains of a veteran with no known NOK and where sufficient financial resources are not otherwise available. Because VA's burial operations do not normally include the acquisition or provision of a casket or an urn, VA is proposing to provide monetary reimbursement for a privately purchased casket or urn for the burial of any veterans whose remains are unclaimed when no NOK can be identified and it is determined that insufficient financial resources are available to pay for cost of the casket or urn. VA believes that monetary reimbursement is a more efficient means to administer this authority because direct provision of caskets and urns would create additional administrative duties and expenses, outside the scope of normal operations, which may impact the timely provision of burial services.

When veterans and other individuals die without sufficient funds for burial and no known NOK, third parties, such as public administrators, local coroners, funeral directors or volunteer organizations, often assume responsibility for the burial of unclaimed remains, to include the provision of a casket or urn for burial at private or public expense. By establishing a means to reimburse these third parties for the expense of a burial receptacle, VA would ensure that these veterans receive an appropriate burial in a national cemetery consistent with Congress' stated objective in enacting the amendment to 38 U.S.C. 2306. Requests for reimbursement would require presentation of an invoice to ensure accountability and quality of the purchased casket or urn, but would be limited to an average cost to ensure appropriate fiscal control.

In paragraph (a) of proposed 38 CFR 38.628, we would state the general applicability of the reimbursement program, which is based on the authority set forth in the Act. Because the Act directs that burial will be in a national cemetery, VA would determine whether the deceased veteran is eligible for burial in one of the VA national cemeteries. Generally, eligibility requirements are set forth in § 38.620. Sections 38.617 and 38.618 contain prohibitions for burial in certain circumstances, and the Act contained new restrictions, based on a deceased veteran's conviction of certain sex offenses, for which VA has not yet published regulations. These legal requirements would also be considered in determining whether a deceased veteran is eligible for burial in a national cemetery.

Paragraphs (a)(1) and (2) of § 38.628 state the additional requirements that were set forth in the Act which define when VA may furnish a burial receptacle. As stated previously, the Act provided authority for VA to furnish a casket or an urn when VA is

unable to identify the veteran's next-of-kin and determines that sufficient resources to purchase the burial receptacle are not otherwise available. These requirements are discussed below.

In paragraph (b) of § 38.628, we propose the requirements necessary for an individual or entity to request reimbursement. To ensure consistent process and submission of information, VA has developed a form to be used for requesting reimbursement. VA has separately requested the Office of Management and Budget approval of the form and published a notice requesting comment on the information collection, as required by the Paperwork Reduction Act. See Paperwork Reduction Act section below.

As proposed, the form and any supporting documentation would provide information sufficient for VA to make determinations regarding the veteran's eligibility for burial in a national cemetery, and the availability of the veteran's next-of-kin and resources for purchasing a burial receptacle. The individual or entity that seeks reimbursement must have attempted to identify both the next-of-kin and available resources. In some cases, an applicant may explain that a veteran's remains have been deemed abandoned based on State law, or describe circumstances that would reasonably lead the applicant to conclude that the veteran's remains are unclaimed by a NOK and sufficient funds are not available for a casket or urn. For purposes of this rulemaking, VA may determine whether a NOK's refusal to arrange for the veteran's burial is deemed the same as the veteran having no next of kin. VA cannot compel an identified NOK who is unwilling or unable to assume responsibility for the deceased veteran's burial. In such cases, VA may recognize third parties who may be substituted

in place of a NOK to inter the remains of deceased veterans that would otherwise remain unclaimed. VA would use its own internal resources to verify information about a deceased veteran's NOK and available financial resources, and in the absence of contrary evidence, the applicant's certifications would be accepted and the request for reimbursement would be accepted.

In paragraphs (b)(4) and (5) of § 38.628, we propose to require the individual or entity to submit an invoice showing the purchase price of the burial receptacle and information sufficient for VA to determine that the burial receptacle is compliant with certain minimum standards. We are aware that burial receptacles available for purchase, particularly caskets, are available in a wide array of materials and in a range of prices. The Federal Trade Commission (FTC), which has authority to regulate funeral industry practices, defines a "casket" in part 453 of title 16 of the Code of Federal Regulations as "a rigid container which is designed for the encasement of human remains and which is usually constructed of wood, metal, fiberglass, plastic, or like material, and ornamented and lined with fabric." In addition, the FTC regulation provides a definition of an "alternative container," which we construe as applicable to cremation urns. An "alternative container" is defined as "an unfinished wood box or other non-metal receptacle or enclosure, without ornamentation or a fixed interior lining, which is designed for the encasement of human remains and which is made of fiberboard, pressed-wood, composition materials (with or without an outside covering), or like materials." VA proposes to establish minimum specifications for a casket or urn eligible for reimbursement based on these definitions, but refined to ensure a "dignified burial." See 38 U.S.C. 2306(f). By establishing minimum specifications, we do not

prohibit individuals or entities from purchasing burial receptacles of higher standard; however, reimbursement would be subject to the maximum rate discussed below.

In paragraph (b)(5)(i) of § 38.628, we propose to require that purchased caskets be at least of 20-gauge metal construction. Although both VA and the individual or entity would have attempted to locate a NOK, there is the possibility that, in the future, someone may come forward to claim a veteran's remains and seek to reinter them somewhere other than a national cemetery. VA believes, based on our experience, that a casket crafted of 20-gauge metal would ensure the integrity of the remains should disinterment and reinterment be required. While other heavier weights of metal caskets are available, we propose that 20-gauge would be a minimum required for reimbursement. This is a standard economical option that is generally available from major vendors of caskets and is in keeping with our intent to provide a durable yet affordable casket.

We would also require that the casket be designed to contain human remains. Not all metal containers are appropriate for burial, nor would any metal container ensure the dignity we expect when burying our nation's veterans. Generally, caskets are of a consistent size, but we do not propose to regulate this element, other than to require that the casket be of sufficient size to contain the remains of the deceased. We note, for information, that the normal plot size in a national cemetery will accommodate caskets up to 82 inches long by 28 inches wide. Larger caskets, however, may be accommodated when necessary. We further propose design elements—that the casket have a gasketed seal and external rails or handles—to ensure integrity of the remains and to allow the casket to be raised and lowered as needed.

We propose to require that urns be constructed of durable plastic, with a secure closure to contain the cremated remains. As with caskets, our proposal for the material is based on our concern that we may need to disinter and reinter these remains. VA national cemeteries provide direct in-ground burial for cremated remains, as well as niches in columbaria. We propose to require durable plastic construction to ensure the integrity of the remains in either case. Similar to our requirement for caskets, we require that the urn be designed for containing cremated human remains, because not all plastic containers are suitable for this purpose.

We note that while these specifications are required for reimbursement under this regulation, they do not reflect a requirement that all caskets or urns used in burials in national cemeteries must meet. VA is committed to ensuring that the wishes of a veteran's family are paramount in burying their loved one. Some families may choose to provide a casket or urn for their veteran that does not meet the standards discussed above. They may even choose, for religious or cultural reasons, to not have a burial container at all. VA endeavors at all times to adhere closely to the wishes of a deceased veteran's family, so we would honor these wishes, providing we can do so while ensuring not only public health and safety but the health and safety of VA employees. In the case of unclaimed remains for which we are furnishing (through reimbursement) a casket or urn, we propose the standards defined above to ensure that each veteran, in the absence of a family member to make such determinations, is laid to rest in a consistently dignified manner.

VA would visually inspect the casket or urn when it arrives at the national cemetery to ensure that it corresponds to the description on the invoice. Provided that

visual inspection and the documentation confirm that the burial receptacle meets the specifications defined above, VA proposes to reimburse the individual or entity for the purchase price shown on the invoice, up to a maximum amount to protect the program from abuse. The Act requires VA to ensure the burial receptacle is “appropriate for a dignified burial.” As discussed above, we believe the standards we have provided would ensure a dignified burial. We do not prohibit an individual or entity from purchasing a burial receptacle that exceeds these standards. However, if VA were to reimburse for any purchase, without limit, we would jeopardize our ability to provide even the most reasonable burial for other deserving veterans. We propose, therefore, in paragraph (c) of § 38.628, to determine the average cost of caskets and urns for the fiscal year preceding calendar year of the purchase, and use that average as a maximum reimbursement limit. Our authority under the Act began on January 10, 2014, therefore all reimbursements for purchases of burial receptacles for individuals who die between January 10, 2014 and December 31, 2014, would be subject to a maximum reimbursement limit based on the average cost of a casket or urn meeting the proposed specification available for purchase during the fiscal year from October 1, 2012 through September 30, 2013. By using the calendar year for the reimbursement, and the fiscal year for the average cost calculation, we provide a three month time frame during which we would calculate the costs for the fiscal year, and develop and publish a notice in the Federal Register to alert individuals and entities of the maximum reimbursement that would be allowed before the beginning of the calendar year.

This proposed rulemaking is being published after the effective date of the Act (January 10, 2014). Because individuals and entities who were responsible for the

unclaimed remains of veterans may have purchased burial receptacles for those remains before the publication of this proposed rule without knowing VA's intended standards for at least 20-gauge metal construction of caskets or durable plastic construction of urns, VA would consider a limited deviation from those standards to allow reimbursement for purchases that do not meet those standards. This deviation is only for the standard that requires a casket to be of at least 20-gauge metal construction or an urn to be of durable plastic construction. All other requirements contained in the proposed regulation would apply, including required gasketed seals and handles or rails, as well as requirements regarding the eligibility of the veteran for burial, lack of a NOK, and insufficient resources to purchase a burial receptacle. If, before the publication date of the proposed rulemaking, an individual or entity purchased a casket or urn for burial in a VA national cemetery of the remains of a veteran who died after January 10, 2014, and the burial receptacle is not at least a 20-gauge metal casket or a durable plastic urn, VA would reimburse the purchase price of the burial receptacle, providing all other criteria in the proposed regulation are met. The reimbursement amount would be subject to the maximum reimbursement amount calculated for 2014.

#### Effect of rulemaking

Title 38 of the Code of Federal Regulations, as revised by this final rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to

conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

#### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612, because the number of claims and the amounts involved are expected to be small. This rule would only impact those third parties and entities that choose to participate in this program. Payments made under this program are not intended as benefits but to provide reimbursement for privately purchased caskets and urns. We estimate the average price of a burial receptacle (and therefore the average reimbursement) would be less than \$2,000 for caskets and less than \$200 for urns. We also estimate that the total number of reimbursements for 2014 would be 338 caskets and 332 urns. Because the proposed rulemaking provides for a reimbursement, the individual or entity purchasing the burial receptacle would recoup the purchase price, up to the maximum rate established annually. Generally this would result in the individual or entity avoiding a financial loss for having made the purchase. But, because the reimbursement would be equal to the purchase price of the burial receptacle, the individual or entity would not experience any gain. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

### Paperwork Reduction Act

This proposed rule includes provisions constituting collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) that require approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review.

OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Proposed 38.628 contains a collection of information under the Paperwork Reduction Act of 1995. If OMB does not approve the collection of information as requested, VA will immediately remove the provisions containing a collection of information or take such other action as is directed by OMB.

Comments on the collections of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies sent by mail or hand delivery to the Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; fax to (202) 273-9026; e-mail to [www.Regulations.gov](http://www.Regulations.gov). Comments should indicate that they are submitted in response to “RIN 2900-AO99 - Reimbursement for Caskets and Urns.”

OMB is required to make a decision concerning the collections of information contained in this proposed rule between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed rule.

The Department considers comments by the public on proposed collections of information in--

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department’s estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;

- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The following is a description of the collection of information contained in 38 CFR 38.628:

Title: Request for Reimbursement of Casket/Urn.

Summary of collection of information: Proposed 38 CFR 38.628 would require submission of new VA Form 40-10088 by individuals seeking reimbursement from VA for the purchase of a casket or urn for the remains of a veteran who had no next of kin and insufficient resources to purchase a burial receptacle.

Description of need for information and proposed use of information: The collection of information is necessary for VA to obtain information sufficient to determine whether reimbursement is appropriate. Information provided would include proof that the requesting individual purchased the burial receptacle, that the burial receptacle meets standards detailed in the regulation, and the purchase price of the receptacle. VA will use this information to determine whether reimbursement is appropriate and, if so, the appropriate amount of the reimbursement.

Description of likely respondents: Individuals in possession of unclaimed remains of veterans, such as coroners or funeral directors, and entities whose mission is to ensure appropriate burial of veteran remains, including veterans service organizations and similar entities.

Estimated number of respondents: VA estimates it will receive approximately 670 applications for reimbursement in FY 2014 and will decrease in future years.

Estimated frequency of responses: The collection of information is required only once for each deceased veteran.

Estimated average burden per response: 15 minutes.

Estimated total annual reporting and recordkeeping burden: 167.5 hours in FY 2014.

#### Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or

more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at <http://www1.va.gov/orpm/>, by following the link for “VA Regulations Published.”

### Comment Period

Although Executive Order 12866 generally requires that agencies afford the public a 60-day comment period, VA has determined that good cause exists to limit the public comment period for this proposed rule to 30 days. This rulemaking is necessary to implement the statutory changes enacted in Public Law 112-260 to increase the availability of benefits for veterans whose remains are unclaimed where sufficient resources are not available for burial expenses. VA must implement the new casket

and urn authority in regulation to inform the public of reimbursement amounts, application procedures, and standards for the caskets or urns. These statutory provisions became effective on January 10, 2014, one year after the enactment date of the law. Accordingly, we are providing a 30-day comment period for the public to comment on the proposed rule.

#### Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program number and title for this proposed rule are 64.201, National Cemeteries.

#### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Chief of Staff, approved this document on June 13, 2014, for publication.

List of Subjects in 38 CFR Part 38

Administrative practice and procedure, Cemeteries, Veterans.

Dated: June 27, 2014.

William F. Russo,  
Deputy Director,  
Office of Regulation Policy & Management,  
Office of the General Counsel,  
U.S. Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 38 as set forth below:

PART 38 – NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS  
AFFAIRS

1. The authority citation for part 38 continues to read as follows:

Authority: 38 U.S.C. 107, 501, 512, 2306, 2402, 2403, 2404, 2408, 2411,  
7105.

2. Add § 38.628 to read as follows:

§ 38.628. Reimbursement for caskets and urns for unclaimed remains of Veterans.

(a) VA will reimburse any individual or entity for the actual cost of a casket or an urn, purchased by the individual or entity for the burial in a national cemetery of an eligible veteran who died on or after January 10, 2014, for whom VA:

- (1) Is unable to identify the veteran's next-of-kin; and
- (2) Determines that sufficient resources are otherwise unavailable to furnish the casket or urn.

(b) An individual or entity may request reimbursement from VA under paragraph (a) of this section by completing and submitting VA Form 40-10088, and supporting documentation, in accordance with the instructions on the form. Prior to approving reimbursement VA must find all of the following:

- (1) The veteran is eligible for burial in a VA national cemetery;
- (2) The individual or entity has certified that they cannot identify the veteran's next-of-kin, and VA's records do not identify a next-of-kin;

(3) The individual or entity has certified that, to the best of their knowledge, sufficient resources are otherwise unavailable to furnish the casket or urn, and VA's records do not indicate such resources;

(4) The invoice presented by the individual or entity clearly indicates the purchase price of the casket or urn purchased by the individual or entity; and

(5) The invoice presented by the individual or entity contains information sufficient for VA to determine, in conjunction with a visual inspection, that the casket or urn meets the following minimum standards:

(i) Caskets must be of 20-gauge metal construction, designed for containing human remains, sufficient to contain the remains of the deceased veteran, include a gasketed seal, and include external fixed rails or swing arm handles.

(ii) Urns must be of durable plastic construction, with a secure closure to contain the cremated remains, and must be designed for containing cremated human remains.

(c) Reimbursement under paragraph (a) of this section will not exceed the average cost of a casket or urn for the fiscal year preceding the calendar year of purchase, as determined by VA and published annually in the Federal Register.

(d) If, before July 2, 2014, an individual or entity purchased a casket or urn for burial in a VA national cemetery of the remains of a veteran who died after January 10, 2014, and the burial receptacle is not at least a 20-gauge metal casket or a durable plastic urn, VA will reimburse the purchase price of the burial receptacle, providing all other criteria in this regulation are met. The reimbursement amount will be subject to the maximum reimbursement amount calculated for 2014.

(Authority: 38 U.S.C. 2306, 2402, 2411)

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